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Attorneys for Kara Espinosa

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

<p>Kara Espinosa</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">v.</p> <p>Newport Capital Recovery Group II, LLC; Kenosian & Miele, LLP</p> <p style="text-align: center;">Defendant.</p>	<p>Case No: <u>'11CV2971 MMAPOR</u></p> <p>Complaint For Damages</p> <p>Jury Trial Demanded</p>
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INTRODUCTION

- The United States Congress has found abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors, and has determined that abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy. Congress wrote the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq. (hereinafter “FDCPA”), to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt

HYDE & SWIGART
Riverside, California

1 collection practices are not competitively disadvantaged, and to promote
2 consistent State action to protect consumers against debt collection abuses.

3 2. The California legislature has determined that the banking and credit system
4 and grantors of credit to consumers are dependent upon the collection of just
5 and owing debts and that unfair or deceptive collection practices undermine
6 the public confidence that is essential to the continued functioning of the
7 banking and credit system and sound extensions of credit to consumers. The
8 Legislature has further determined that there is a need to ensure that debt
9 collectors exercise this responsibility with fairness, honesty and due regard
10 for the debtor's rights and that debt collectors must be prohibited from
11 engaging in unfair or deceptive acts or practices.

12 3. Kara Espinosa, ("Plaintiff"), through Plaintiff's attorneys, brings this action to
13 challenge the actions of Newport Capital Recovery Group II, LLC,
14 ("Defendant Newport Capital") and Kenosian & Miele, LLP ("Defendant
15 K&M") (collectively "Defendants"), with regard to attempts by Defendants to
16 unlawfully and abusively collect a debt allegedly owed by Plaintiff, and this
17 conduct caused Plaintiff damages.

18 4. Plaintiff makes these allegations on information and belief, with the exception
19 of those allegations that pertain to a plaintiff, or to a plaintiff's counsel, which
20 Plaintiff alleges on personal knowledge.

21 5. While many violations are described below with specificity, this Complaint
22 alleges violations of the statutes cited in their entirety.

23 6. Unless otherwise stated, all the conduct engaged in by Defendants took place
24 in California.

25 7. Any violations by Defendants were knowing, willful, and intentional, and
26 Defendant did not maintain procedures reasonably adapted to avoid any such
27 violation.
28

1 8. Any and all violations alleged against Defendant K&M are imputed to
2 Defendant Newport Capital under the theory of vicarious liability, because the
3 actions undertaken by Defendant K&M were an attempt to collect the alleged
4 debt by an attorney's office on behalf of Defendant Newport Capital.

5 9. All violations alleged under the FDCPA and Rosenthal Act are alleged as
6 against all Defendants.

7 JURISDICTION AND VENUE

8 10. Jurisdiction of this Court arises pursuant to 28 U.S.C. § 1331, 15 U.S.C. §
9 1692(k), and 28 U.S.C. § 1367 for supplemental state claims.

10 11. This action arises out of Defendant's violations of the Fair Debt Collection
11 Practices Act, 15 U.S.C. §§ 1692 et seq. ("FDCPA") and the Rosenthal Fair
12 Debt Collection Practices Act, California Civil Code §§ 1788-1788.32
13 ("Rosenthal Act").

14 12. Because Defendants do business within the State of California, personal
15 jurisdiction is established.

16 13. Venue is proper pursuant to 28 U.S.C. § 1391.

17 14. At all times relevant, Defendants conducted business within the State of
18 California.

19 PARTIES

20 15. Plaintiff is a natural person who resides in the City of San Diego, in the State
21 of California.

22 16. Defendant Newport is located in the City of Newport Beach, in the State of
23 California.

24 17. Defendant K&M is located in the City of Los Angeles, in the State of
25 California.

26 18. Plaintiff is obligated or allegedly obligated to pay a debt, and is a "consumer"
27 as that term is defined by 15 U.S.C. § 1692a(3).
28

19. Defendants are persons who use an instrumentality of interstate commerce or the mails in a business the principal purpose of which is the collection of debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another and are therefore debt collectors as that phrase is defined by 15 U.S.C. § 1692a(6).

20. Plaintiff is a natural person from whom a debt collector sought to collect a consumer debt which was due and owing or alleged to be due and owing from Plaintiff, and is a “debtor” as that term is defined by California Civil Code § 1788.2(h).

21. Defendants, in the ordinary course of business, regularly, on behalf of themselves, or others, engages in debt collection as that term is defined by California Civil Code § 1788.2(b), are therefore debt collectors as that term is defined by California Civil Code § 1788.2(c).

22. This case involves money, property or their equivalent, due or owing or alleged to be due or owing from a natural person by reason of a consumer credit transaction. As such, this action arises out of a consumer debt and “consumer credit” as those terms are defined by Cal. Civ. Code § 1788.2(f).

FACTUAL ALLEGATIONS

23. Sometime before 2009, Plaintiff is alleged to have incurred certain financial obligations.

24. These financial obligations were primarily for personal, family or household purposes and are therefore a “debt” as that term is defined by 15 U.S.C. §1692a(5).

25. These alleged obligations were money, property, or their equivalent, which is due or owing, or alleged to be due or owing, from a natural person to another person and are therefore a “debt” as that term is defined by California Civil Code §1788.2(d), and a “consumer debt” as that term is defined by California Civil Code §1788.2(f).

1 26. Sometime thereafter, but before 2009, Plaintiff allegedly fell behind in the
2 payments allegedly owed on the alleged debt. Plaintiff currently takes no
3 position as to the validity of this alleged debt.

4 27. Subsequently, but before 2009, the alleged debt was assigned, placed, or
5 otherwise transferred, to Defendant for collection.

6 28. In 2009 Plaintiff received a telephone call from Defendant Newport Capital
7 attempting to collect the alleged debt from her.

8 29. This communication to Plaintiff was a “communication” as that term is
9 defined by 15 U.S.C. § 1692a(2), and an “initial communication” consistent
10 with 15 U.S.C. § 1692g(a).

11 30. This communication was a “debt collection” as Cal. Civ. Code 1788.2(b)
12 defines that phrase, and an “initial communication” consistent with Cal. Civ.
13 Code § 1812.700(b).

14 31. During her 2009 telephonic conversation with Defendant Newport Capital
15 Plaintiff requested verification of the alleged debt to be mailed to her and she
16 provided Defendant Newport Capital with her current residential address.

17 32. Per their 2009 telephone conversation, Defendant Newport Capital sent
18 Plaintiff a form letter stating it owned the alleged debt.

19 33. Defendant Newport Capital sent its letter to Plaintiff at the residential address
20 which she had provided during the 2009 telephone conversation.

21 34. There were no communications between Plaintiff and Defendant Newport
22 Capital from 2009 until September 2011 when Plaintiff’s bank account was
23 levied.

24 35. Upon discovery of a bank levy on her personal banking account Plaintiff
25 immediately contacted the San Diego Sheriff’s Department.

26 36. The San Diego Sheriff’s Department informed Plaintiff that the bank levy was
27 executed on behalf of Defendant Newport Capital because Defendant
28 Newport Capital had filed a state court collections case against her and

1 obtained a default judgment against her in San Diego Superior Court, case
2 number 37-2010-00095730-CL-CL-CTL.

3 37. Shortly after her communication with the San Diego Sheriff's Department
4 Plaintiff obtained copies of the documents filed in the state court collections
5 case, to include the proof of service of summons filed by Defendants.

6 38. Defendant Newport Capital, through its attorney Defendant K&M, had filed a
7 proof of service in the state court collections case which stated that Plaintiff
8 had been served the summons and complaint via substitute service at an
9 address which Plaintiff had never resided at- her ex-husband's parents' house.

10 39. In September 2011, Plaintiff telephoned Defendant Newport Capital and
11 informed Defendant Newport Capital that she had never received any
12 paperwork, to include the summons and complaint, regarding the state court
13 collections case.

14 40. During the September 2011 telephone call Plaintiff asked Defendant Newport
15 Capital why no paperwork regarding the state court collections case had been
16 sent to her residential address which she had provided to Defendant Newport
17 in 2009.

18 41. Defendant Newport informed Plaintiff, that her residential address had been
19 "vacant" at the time Defendant Newport had served the state court lawsuit.

20 42. Plaintiff's address was in fact not vacant at the time of alleged service of the
21 state court summons, as Plaintiff was both a resident and the property
22 manager of the building.

23 43. Furthermore, due to her position as property manager, Plaintiff's name and
24 telephone number were visibly posted on the building.

25 44. Plaintiff received no telephone call from anyone attempting to serve the
26 summons and complaint for the state court collections case.

27 ///

28 ///

1 45. During her September 2011 conversation with Defendant Newport Capital
2 Plaintiff even confirmed that her correct residential address was in Defendant
3 Newport Capital's file.

4 46. Immediately following her September 2011 telephone conversation with
5 Defendant Newport Capital, Plaintiff filed a claim of exemption in the state
6 court collections case to prevent further bank levy action.

7 47. Defendants opposed Plaintiff's claim of exemption filing in the state court
8 collections case.

9 48. Plaintiff then retained current counsel to file a motion to set aside the default
10 judgment in the state court collections case.

11 49. Plaintiff's counsel prepared and filed a motion to set aside default judgment
12 and quash service of summons in the state court action on November 2, 2011.

13 50. Defendants did not oppose Plaintiff's motion, but rather filed a limited
14 opposition to Plaintiff's request for sanctions.

15 51. On November 17, 2011 Plaintiff's motion was heard before the San Diego
16 Superior Court and the state court granted Plaintiff's motion, vacating
17 Defendant Newport Capital's judgment, quashing service of summons, and
18 imposing sanctions on Defendants for their recklessness by failing to serve
19 Plaintiff at her correct address which Defendants had on file.

20 52. Through this conduct, Defendants collected or attempted to collect a
21 consumer debt by means of judicial proceedings when the debt collector knew
22 that service of process had not been legally effected. Consequently,
23 Defendants violated Cal. Civ. Code § 1788.15(a).

24 53. Through this conduct, Defendants used a false, deceptive, or misleading
25 representation or means in connection with the collection of a debt.
26 Consequently, Defendants violated 15 U.S.C. § 1692e and 15 U.S.C. § 1692e
27 (10).
28

1 54. Because this violated certain portions of the federal Fair Debt Collection
2 Practices Act as these portions are incorporated by reference in the Rosenthal
3 Fair Debt Collection Practices Act, through California Civil Code § 1788.17,
4 this conduct or omission violated Cal. Civ. Code § 1788.17.

5 55. Through this conduct, Defendants were collecting an amount (including any
6 interest, fee, charge, or expense incidental to the principal obligation) when
7 such amount was not expressly authorized by the agreement creating the debt
8 or permitted by law. Consequently, Defendants violated 15 U.S.C. § 1692f
9 (1).

10 56. Because this violated certain portions of the federal Fair Debt Collection
11 Practices Act as these portions are incorporated by reference in the Rosenthal
12 Fair Debt Collection Practices Act, through California Civil Code § 1788.17,
13 this conduct or omission violated Cal. Civ. Code § 1788.17.

14 57. Due to Defendants actions, Plaintiff suffered actual damages in the form of
15 attorneys fees and costs incurred in her efforts to set aside the state court
16 default judgment.

17 58. Due to Defendants' actions, Plaintiff suffered further actual damages in the
18 form of mental anguish which manifested in symptoms including but not
19 limited to: nervousness, stress, anxiety, loss of sleep, and fear of answering
20 the telephone, feelings of hopelessness, guilt, helplessness, irritability, and
21 restlessness, all impacting Plaintiff's personal relationships.

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CAUSES OF ACTION**COUNT I****FAIR DEBT COLLECTION PRACTICES ACT (FDCPA)****15 U.S.C. §§ 1692 ET SEQ.**

59. Plaintiff repeats, re-alleges, and incorporates by reference, all other paragraphs.

60. The foregoing acts and omissions constitute numerous and multiple violations of the FDCPA, including but not limited to each and every one of the above-cited provisions of the FDCPA, 15 U.S.C. § 1692 et seq.

61. As a result of each and every violation of the FDCPA, Plaintiff is entitled to any actual damages pursuant to 15 U.S.C. § 1692k(a)(1); statutory damages in an amount up to \$1,000.00 pursuant to 15 U.S.C. § 1692k(a)(2)(A); and, reasonable attorney's fees and costs pursuant to 15 U.S.C. § 1692k(a)(3) from Defendants.

COUNT II**ROSENTHAL FAIR DEBT COLLECTION PRACTICES ACT (ROSENTHAL ACT)****CAL. CIV. CODE §§ 1788-1788.32**

62. Plaintiff repeats, re-alleges, and incorporates by reference, all other paragraphs.

63. The foregoing acts and omissions constitute numerous and multiple violations of the Rosenthal Act, including but not limited to each and every one of the above-cited provisions of the Rosenthal Act, Cal. Civ. Code §§ 1788-1788.32

64. As a result of each and every violation of the Rosenthal Act, Plaintiff is entitled to any actual damages pursuant to Cal. Civ. Code § 1788.30(a); statutory damages for a knowing or willful violation in the amount up to \$1,000.00 pursuant to Cal. Civ. Code § 1788.30(b); and reasonable attorney's fees and costs pursuant to Cal. Civ. Code § 1788.30(c) from Defendants.

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PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that judgment be entered against each Defendant, jointly and severally, and Plaintiff be awarded damages from each Defendant, as follows:

- An award of actual damages pursuant to 15 U.S.C. § 1692k(a)(1);
- An award of statutory damages of \$1,000.00 pursuant to 15 U.S.C. § 1692k(a)(2)(A);
- An award of costs of litigation and reasonable attorney's fees, pursuant to 15 U.S.C. § 1692k(a)(3);
- An award of actual damages pursuant to California Civil Code § 1788.30(a);
- An award of statutory damages of \$1,000.00 pursuant to Cal. Civ. Code § 1788.30(b);
- An award of costs of litigation and reasonable attorney's fees, pursuant to Cal. Civ. Code § 1788.30(c).

65. Pursuant to the seventh amendment to the Constitution of the United States of America, Plaintiff is entitled to, and demands, a trial by jury.

Respectfully submitted,

Hyde & Swigart

Date: December 20, 2011

By: /s/ Andrea Darrow Smith

Andrea Darrow Smith
Email: andrea@westcoastlitigation.com
Attorneys for Plaintiff

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

Kara Espinosa

(b) County of Residence of First Listed Plaintiff San Diego, CA

(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)

Hyde & Swigart

411 Camino Del Rio South Suite 301, San Diego, CA 92108

DEFENDANTS

Newport Capital Recovery Group, II, LLC; Kenosian & Miele, LLP

County of Residence of First Listed Defendant Orange, CA

(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

'11CV2971 MMAPOR

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF | | PTF | DEF |
|---|----------------------------|----------------------------|--|----------------------------|----------------------------|
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated <i>or</i> Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated <i>and</i> Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	<input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input checked="" type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	PRISONER PETITIONS <input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition		

V. ORIGIN

(Place an "X" in One Box Only)

- ☒ 1 Original Proceeding
- ☐ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from another district (specify)
- ☐ 6 Multidistrict Litigation
- ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

15 U.S.C. § 1692 et seq.

Brief description of cause:

Unfair Debt Collection Practices**VII. REQUESTED IN COMPLAINT:**
☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$

\$75,001.00+

CHECK YES only if demanded in complaint:

JURY DEMAND:

☒ Yes☐ No**VIII. RELATED CASE(S) IF ANY**

(See instructions):

JUDGE

DOCKET NUMBER

DATE

SIGNATURE OF ATTORNEY OF RECORD

12/20/2011

s/Andrea D. Smith

FOR OFFICE USE ONLY

RECEIPT #

AMOUNT

APPLYING IFP

JUDGE

MAG. JUDGE